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No. 92-146

In The

Supreme Court of the United States

October Term, 1992

SHARON K. CESARO,

Petitioner,

v.

LAKEVILLE COMMUNITY SCHOOL DISTRICT, LAKEVILLE EDUCATION ASSOCIATION, AND THOR PETERSEN; INDIVIDUALLY AND AS SUPERINTENDENT OF LAKEVILLE COMMUNITY SCHOOL DISTRICT,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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I. DOES THE RECORD SUPPORT RESPONDENTS' ASSERTION THAT MR. THOR PETERSEN'S DECISION TO POST THE NOTICE OUTSIDE THE DISTRICT IS IRRELEVANT?

Respondent stated on page 6 of its answer, "The external posting was not the ultimate employment decision on which *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) focused and, thus, Dr. Petersen's motivation was irrelevant."

The relevance of the decision by the superintendent to resort to external posting was clearly articulated by the trial court by specific findings of fact:

> Petersen intended to sexually discriminate against Plaintiff, page 8c.
>
> " * * * Gutshall would never have had an opportunity to be considered for the position, had Petersen not discriminated against Plaintiff by refusing to recommend her promotion from within the school system. Moreover, Petersen would have made such an internal promotion recommendation had Plaintiff been a male. The Board unknowingly and unwillingly gave effect to Petersen's discriminatory intent." (Page 18c-19c)
>
> "The conclusion is inescapable that but for the Plaintiff's sex, she would have received this appointment and liability of the Board for this Title VII violation is properly determined based upon Superintendent Petersen's conduct in sexually discriminating against Plaintiff." (Page 20c)
>
> "The evidence supports a finding that Superintendent Petersen did not intend Plaintiff to ever have this position because of her sex." (Page 10c)

At page 17c, the trial court gave its detailed findings regarding the importance of the external posting as a factor in the trial court's decision in favor of Plaintiff. The trial court had the benefit of personally viewing each of the witnesses.

The reasonable conclusion is that without the sex discrimination practiced by Petersen, Mr. Gutshall would

never have been even considered for the position and Mrs. Cesaro would be the director of the special education program at Lakeville High School today. The relevance of the decision by Petersen to publish outside the district was clearly understood and articulated by the trial court.

II. DOES THE RECORD SUPPORT RESPONDENTS' CLAIM THAT THE FOUR PERSON SCREENING COMMITTEE RECOMMENDED GUTSHALL AS THE MOST QUALIFIED?

On page 3 of its answer, Respondent claims that the screening committee recommended Gutshall as the most qualified of the three candidates.

The record does not support that claim. The trial court found at page 4c: "The committee met, considered the applicants and their qualifications, and submitted to the Board a list of the three candidates it deemed most qualified. Plaintiff was one of the three." Respondent seeks to leave the impression that Mr. Gutshall was found by the committee to be the most qualified. Actually, all three, including Plaintiff, were found to be the most qualified among the five applicants.

III. DOES THE RECORD SUPPORT RESPONDENTS' ASSERTION THAT PART IV OF PETITIONER'S PETITION IS FRIVOLOUS AND UNSUPPORTED BOTH LEGALLY AND FACTUALLY?

Respondent states at page 2 of its Answer, "Petitioner's assertions in part IV of her Petition are frivolous and unsupported both legally and factually."

Apparently the trial court did not think that Petitioner's claim was either frivolous or unsupportable. At page 19c, the Court said that, "if the Board's defense here were to be accepted in the face of Superintendent Petersen's sexually discriminatory conduct, it could and would lead to the frustration of one of the purposes of Title VII; providing a remedy for sexual discrimination in employment."

There is little doubt that if *Cesaro* is allowed to stand as precedent in the Sixth Circuit, defense attorneys will regard it as a blue print for advising employers on how to avoid liability for purposeful sex discrimination prohibited by Title VII.

Respectfully submitted,

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